Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Joseph Keller, Petitioner

v.

United States of America

v.

Lillian Halstead

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Eighth Circuit err in determining that Joseph Keller was a "responsible person" under Title 26 of the United States Code section 6672?

2. Did the United States Court of Appeals for the Eighth Circuit err in determining that Joseph Keller's conduct was "willful" under Title 26 of the United States Code section 6672?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1994

JOSEPH KELLER, Petitioner

v.

UNITED STATES OF AMERICA

v.

LILLIAN HALSTEAD

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Joseph Keller, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eight Circuit entered in the above entitled case on February 2, 1995 and its denial of Joseph Keller's petition for rehearing entered March 30, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and is printed in Appendix A attached hereto, *infra*, page A-1. The opinion of the United

States District Court for the District of North Dakota Southwestern Division is printed in Appendix B attached hereto, *infra*, page B-1. The order denying the Appellant's petition for rehearing is printed in Appendix C attached hereto, *infra*, page C-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit (Appendix A, *infra*, page A-1) was entered on February 2, 1995. A timely petition for rehearing was denied on March 30, 1995 (Appendix B, *infra*, page B-1). The jurisdiction of the United States Supreme Court is invoked under Title 28 of the United States Code section 1254.

STATUTE INVOLVED

The statutory provision relevant to this case is section 6672 of Title 26 of the United States Code, which is set out verbatim *infra*:

§ 6672 Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule. Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

(b) Extension of period of collection where bond is filed.

(1) In general. If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person --

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(1), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Suit must be brought to determine liability for penalty. If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to

such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond. The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1 1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection. The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection. If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

STATEMENT OF THE CASE

THE RULINGS BELOW

Joseph Keller filed a complaint in the United States District Court for the District of North Dakota, Southwestern Division under federal question jurisdiction to recover a 100% tax penalty assessed by, and paid to, the United States of America pursuant to 26 U.S.C. § 6672. The United States District Court had jurisdiction over the complaint pursuant to 28 U.S.C. § 1346(a)(1). The United States District Court granted summary judgment in favor of the United States and Joseph Keller appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the judgment of the District Court. Joseph Keller timely submitted a petition for rehearing to the Eighth Circuit Court of Appeals which was denied March 30, 1995. Joseph Keller now submits this Petition for Writ of Certiorari.

FACTUAL BACKGROUND

From May 1982 through June 30, 1988, Joseph Keller ("Keller"), served as the personal representative of Wilhelm

Keller's estate. Appellant's Brief at 1, *Keller v. U.S.*, No. 93-3793 (8th Cir.). Wilhelm Keller was Joseph Keller's brother. At the time of his death, Wilhelm Keller ("Wilhelm") owned a hotel, the Sleepy Hollow Inn ("the Inn"). By his will, Wilhelm directed his personal representative to operate the Inn until it could be sold. In 1982, the Inn was sold but the buyers defaulted in 1985 and the Inn was returned to the estate. (Appellant's Brief at 1,2).

At that time, Keller wanted to be removed as personal representative and he petitioned the probate court to have a trustee appointed. The court determined that the trustee candidate had a conflict of interest and ordered Keller to continue acting as personal representative. (Appellant's Brief at 2).

Keller is a retired farmer with an eighth grade education who had no experience managing a restaurant and hotel business. Keller notified Wilhelm's heirs ("the heirs") of his desire to turn the Inn over to the bank holding the mortgage. The heirs objected and demanded that Keller allow them to

operate the Inn, threatening to sue him if he did not comply with their wishes. Keller acquiesced in return for the heirs' promise that they would take full responsibility for the Inn. (Appellant's Brief at 3, 5)

In January 1986, the heirs hired Lillian Halstead ("Halstead") to manage the Inn, keep the books and maintain the Inn's checking account. (Appellant's Brief at 3). As the manager, she was responsible for the day-to-day operations of the Inn. Keller was not a signatory on the Inn's checking account and had no authority over the day-to-day operations of the Inn. (Appellant's Brief at 6) Additionally, Keller had no control over any of the finances of the Inn. (Appellant's Brief at 3)

In October 1987, it was discovered that Halstead had not remitted the Inn's federal withholding taxes for the third and fourth quarters of 1986. (Appellant's Brief at 4) The estate attorney told Keller that Halstead and the heirs were legally responsible for submitting the past due withholding taxes. (Appellant's Brief at 3) Keller and the estate attorney then

filed the quarterly reports and paid as much of the taxes as was possible from the estate's bank account and federal tax refund. (Appellant's Brief at 4)

Keller then again expressed his desire to the heirs that the Inn be closed. After meeting with the bank, the estate's attorney and a Small Business Administration ("SBA") counselor, Keller agreed to allow the Inn to continue operating. Keller instructed Halstead to comply with the reporting and withholding tax requirements. (Appellant's Brief at 4) Keller felt that with the involvement of the SBA and the estate attorney, Halstead would be diligent in submitting the federal withholding taxes for the Inn. Thereafter, Keller made regular inquiries and was constantly assured that taxes were being paid. (Appellant's Brief at 5)

In June 1988, the Inn was closed after it was discovered that Halstead had again failed to pay federal withholding taxes. In March 1990, the Internal Revenue Service (IRS), pursuant to 26 U.S.C. § 6672, assessed a penalty against Keller in the amount of $18,485.57 for the withholding tax due from the Inn

and found him to be a responsible person who had willfully failed to pay federal withholding tax.

REASONS FOR GRANTING WRIT

The United States Court of Appeals for the Eighth Circuit has decided an important question of federal law in a way that conflicts with applicable decisions of the other circuits and with an applicable decision of the United States Supreme Court.

A. KELLER'S ACTIONS AS FIDUCIARY DID NOT MAKE HIM A RESPONSIBLE PERSON AS CONTEMPLATED BY TITLE 26 OF THE UNITED STATES CODE SECTION 6672

The Eighth Circuit Court of Appeals held that "Keller's own actions reflect that he considered himself to have certain authority and responsibility in matters relating to the payment of employment taxes. Although he may have delegated to Halstead certain responsibilities relating to the operation of the Inn, that delegation did not divest Keller of the ultimate authority to prevent the Inn's default in payment of the taxes. Accordingly we hold that Keller was a responsible person within

the meaning of section 6672." *Joseph Keller v. U.S.*, No. 93-3793, at 5,6 (8th Cir. Feb. 2, 1995).

The Eighth Circuit Court's determination that Keller's holding of the fiduciary office of personal representative made him a responsible person is in error. Keller was acting in a fiduciary capacity as personal representative of the estate. *Id.* at 1. Keller was receiving no pay for being personal representative while the Inn was in operation. He had no ownership interest in the Inn and therefore no prospect of financial gain from its operation.

Keller's situation is analogous to others who have served in fiduciary capacities and who have not been held to be responsible persons under section 6672 of Title 26 of the United States Code ("section 6672") by other courts. In one such case, Godfrey, as chairman of the board of directors of a corporation, served in a fiduciary capacity. However, the court found that he was not a responsible person under section 6672. *Godfrey, Jr. v. U.S.*, 748 F.2d 1568 (Fed.Cir. 1984). The fiduciary, Godfrey, was much more involved in the business affairs of the

corporation than Keller. Godfrey had taken the lead in attempting to avoid the business's insolvency, had negotiated emergency loans and recapitalization plans, had helped arrange for the sale of corporate assets and had participated in the hiring and firing of top corporate management. *Id.* at 1571.

The court found that Godfrey had become the single most important individual directing the business affairs of the corporation. Yet, the court observed that in no case has an outside director of a publicly held corporation, who neither signed nor had authority to sign checks, who did not participate in the day-to-day fiscal management of the corporation, who did not control the payroll, who did not determine which creditors would be paid, and who did not own a significant fraction of the corporation's voting securities been held a responsible person under section 6672. *Id.* at 1576. Aware of the policy implication entailed by too broad of a reading of "responsible person", the *Godfrey* court noted: "To hold Godfrey a "responsible person" on the present record would be to hold as

a "responsible person" every board chairman who took an active interest in the solvency of the corporation he serves." *Id.*

Though Keller's involvement with the Inn did not even rise to the level of Godfrey's involvement, his position in other respects was virtually identical to that of Godfrey in that he neither signed nor had authority to sign the Inn's checks, did not participate in the day-to-day fiscal management of the Inn, did not control payroll, did not determine which creditors would be paid and did not own a significant portion of the business. These important factors are indistinguishable between these cases, yet the two courts reached very different decisions.

There are other cases similar to *Godfrey* in which the courts reached the same result as *Godfrey*. One such case is *In Re: Donald D. Derickson,* 104 Bankr. 346, 89-2 U.S. Tax Ca. (CCH) ¶ 9480 (Jul. 3, 1989). Derickson was the 50% owner of a corporation that owned an Arby's franchise restaurant along with a man named Bayne. Derickson never intended to participate in the corporation's day-to-day affairs, financial or otherwise, because these duties were to be performed by Bayne.

Id. at 348. Bayne did in fact perform these duties and was responsible for the day-to-day operations and financial affairs of the business. Derickson contacted Bayne regarding payroll tax liabilities and was consistently assured that payments were being made. In that case, the court stated: "Here, since the debtor did not exercise the influence or control over the day-to-day financial affairs of the respective corporations, since he did not direct or control the payment of corporate funds, this court concludes that he is not a "responsible person" under 26 U.S.C. § 6672." *Id.* at 350.

In another similar case, the District Court of New York stated: "The record demonstrates that the trustees were not involved in the day-to-day operation of [the business], did not sign checks, did not decide which creditors would be paid, did not hire or fire employees, and did not involve themselves in the collection, accounting for or payment over of withholding taxes." *Edward Simpson, Jr. v. U.S.*, 664 F.Supp. 43 (D.C. NY 1987). The court said that it was satisfied that the trustees were not responsible persons under established precedent, and "what

is more, the precedent is amply justified by public policy. If the government's reading of responsible person were adopted, no rational individual would volunteer to serve on the board of a not-for-profit corporation. . ." *Id.* at 49.

A similar public policy argument applies here regarding a personal representative such as Keller. Keller had no control over the day-to-day operations of the Inn, he had no authority to sign checks on behalf of the Inn nor did he have any control over the Inn's fiscal resources. Keller did not hire or fire the Inn's employees, he did not have any say in which creditors would be paid and he was assured by the heirs that they would take full responsibility for overseeing Halstead's compliance with remitting withholding taxes. Keller was ordered, against his wishes, to continue serving as personal representative and who because of the threat of being sued for turning the business over to the bank, allowed the heirs to run the business. Letting the heirs do so may have been an error in judgment on Keller's part, but it, and his limited involvement with the Inn, does not make him a "responsible person" in this matter.

B. KELLER DID NOT WILLFULLY FAIL TO PAY OVER WITHHOLDING TAXES

The Eighth Circuit Court held that Keller "was obligated to apply unencumbered funds of the Inn to pay the taxes due for the last two quarters of 1986 and any future quarters." *Keller v. U.S.*, No. 93-3793, at 7 (8th Cir. Feb. 2, 1995). The court's opinion was that Keller's continued operation of the business after he found out that taxes had not been paid amounted to willfulness on his part since the Inn continued to pay other creditors while withholding taxes were due. *Id.* This holding makes Keller a guarantor for payment of the delinquent taxes just because he allowed the continued operation of the business. This holding is contrary to the United States Supreme Court decision in *Slodov v. United States*, 436 U.S. 238, 56 L.Ed.2d, 98 S.Ct. 1778 (1978).

In *Slodov*, the government argued that a "responsible person" renders himself personally liable to the section 6672 penalty by using gross receipts to purchase inventory or pay wages, or even by using personal funds for these purposes, so

long as any withholding taxes remain unpaid to the United States. *Id.* at 250. This Court disagreed, stating that under this theory "as soon as the corporation embarks on [continued business operations] however, the 'responsible person' is potentially liable to heavy civil and criminal penalties not for doing anything which compromised the government's collection efforts, but for doing what the government regards as maximizing its chances for recovery. *Id.* at 253. As construed by the government, section 6672 would merely discourage changes of ownership and management of financially-troubled corporations, and the infusion of equity or debt funding which might accompany it. . ." *Id.* The Court went on to say the government's argument, if adopted by the Court, would "in effect, make the responsible person assuming control of the business a guarantor for payment of the delinquent taxes simply by undertaking to continue the operation of the business. That construction is precluded by the history and context of § 6672 and cognate provisions of the Code." *Id.* at 253-4.

The government in this case urged the Eighth Circuit to hold that Keller's awareness of past tax deficiencies created an affirmative duty to investigate and absolutely prevent all future deficiencies. The government also argued that Keller's failure to prevent the subsequent tax deficiency constituted a breach of that duty and that breach established Keller's personal fault under the statute. This same position was asserted by the government in *Godfrey* but was rejected by that court which said "to hold Godfrey's knowledge of a past delinquency alone makes him a guarantor of future tax payments would be contrary to the logic of the Supreme Court's decision of willfulness in *Slodov v. United States*, 436 U.S. 238, 56 L.Ed.2d 251, 98 S.Ct. 1778." *Godfrey* at 1577.

The Eighth Circuit also held that "Keller's failure to appropriately supervise Halstead or take independent action to ensure that withholding taxes were being paid was reckless, and therefore, constitutes willful conduct." *Keller v. U.S.* No. 93-3793, at 7 (8th Cir. Feb. 2, 1995). Even if Keller's actions after learning of the failure to pay taxes would be considered reckless

and therefore willful, this should not make him a guarantor of the taxes incurred prior to his knowledge of the failure of Halstead to remit the taxes. Therefore, at most, only those taxes incurred after Keller learned of Halstead's failure to pay taxes could be subject to the one hundred percent penalty of section 6672.

Keller did everything he could to ensure that the taxes were paid. In October, 1987, upon learning that Halstead had failed to pay the withholding taxes, Keller filed the Inn's quarterly returns and used all estate funds in his possession to make payment toward the amount of taxes due. These actions certainly cannot be considered to be reckless regarding taxes incurred prior to then. They are the actions of a person who is being responsible and doing everything in his power to make sure taxes were paid.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted this 21st day of June, 1995.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 93-3793

Joseph Keller,	*	
	*	
Plaintiff/Appellant,	*	
	*	
v.	*	
	*	Appeal from the United States
United States of America,	*	District Court for the
	*	District of North Dakota.
Defendant/Appellee,	*	
	*	
v.	*	
	*	
Lillian Halstead,	*	
	*	
Counter-Defendant/ Appellee.	*	

Submitted: October 13, 1994

Filed: February 2, 1995

Beffore WOLLMAN, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and HANSEN, Circuit Judge.

WOLLMAN, Circuit Judge.

In this federal tax case, Joseph Keller appeals from the district court's [1] grant of summary judgment in favor of the United States with respect to his liability under 26 U.S.C. § 6672. We affirm.

I.

Joseph Keller served as the personal representative of the estate of his brother, Wilhelm Keller (Wilhelm). At the time of his death in 1982, Wilhelm was the owner of the Sleepy Hollow Inn (Inn) in Beulah, North Dakota. Wilhelm's will directed the estate's personal representative to operate the Inn until it could be sold. In 1982, Keller sold the Inn under a contract for deed. After the buyers experienced financial difficulties in 1984, Keller renegotiated terms of the contract. The buyers, however, eventually defaulted on the contract in 1985, and the Inn was returned to Wilhelm's estate. Keller then participated in a meeting with the estate's heirs and the estate's attorney at that meeting, Keller expressed his desire to turn the

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[1]The Honorable Paul Benson, Senior United States District Judge for the District of North Dakota.

the Inn over to the bank holding the mortgage. After the heirs objected, Keller ultimately agreed to let the heirs operate the Inn.

Keller hired Lillian Halstead as the manager of the Inn. Halstead was employed in that position from January 1986 until the Inn was closed in June 1988. Her duties included maintaining the Inn's checking account, keeping the books, and setting the salaries for employees. She also prepared the Inn's tax returns and paid amounts due for worker's compensation insurance and state withholding taxes. As manager, Halstead was responsible for the day-to-day operation of the Inn.

Keller also authorized the employment of a secretarial service, which was initially retained to manage the Inn's bookkeeping, payroll, and state and federal tax reporting requirements. The service filed the reports and paid the withholding taxes for the first two quarters of 1986. The Inn subsequently defaulted on its payments to the secretarial service, and Keller had to negotiate a settlement for its fees. Thereafter, Halstead and one of the heirs employed at the Inn

took over the payroll, and Keller instructed that they consult with the estate's attorney to learn how to comply with payroll tax reporting and payment requirements.

Sometime around October 1987, Keller discovered that the Inn's federal withholding taxes had not been remitted for the third and fourth quarters of 1986. He then filed the quarterly reports for those quarters and made payments toward the amounts due. Again, Keller expressed his desire to shut down the Inn. After attending a meeting to discuss the situation with Halstead, the bank, the estate's attorney, and a Small Business Administration counselor, Keller once again agreed to allow the Inn to continue operating. Keller thereafter instructed Halstead to comply with the reporting requirements and to pay the withholding taxes in the future. Other than periodically inquiring of Halstead whether she was following his instructions, Keller did nothing to ensure that taxes were actually being remitted. In June 1988, Keller finally closed the Inn after discovering that Halstead had continued to fail to pay federal withholding taxes.

In March 1990, the Internal Revenue Service (IRS), pursuant to 26 U.S.C. § 6672, assessed a penalty against Keller in the amount of $18,485.57 for the third and fourth quarters of 1986, all of 1987, and the first and second quarters of 1988. The ITS charged that Keller was a responsible person who had willfully failed to pay over federal employment taxes withheld from the wages of the Inn's employees. Keller paid a nominal amount and filed a claim for a refund and an abatement. After the IRS denied the claim, Keller filed suit in federal court. The government filed a counterclaim against Keller and Halstead, seeking payment of the remainder of the assessment. The district court granted the government's motion for summary judgment on its counterclaim against both Keller and Halstead and dismissed Keller's complaint. This appeal followed.[2]

II.

We review a district court's grant of summary judgment de novo. Willman v. Heartland Hospital East, 34 F.3d 605, 609

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[2]Halstead did not appeal the district court's judgment.

(8th Cir. 1994). We must inquire whether the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law. Id. at 609-10.

Section 6672 provides in pertinent part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or willfully attempts in any manner to evade to defeat any such tax or the payment thereof, shall ... be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

To incur liability under section 6672 for unpaid employment taxes, an individual must 1) be a responsible person who 2) willfully fails to pay over withholding taxes to the United States. E.g. Jenson v. United States, 23 F.3d 1393, 1394 (8th Cir. 1994); Barton v. United States, 988 F.2d 58, 59 (8th Cir.

1993). An individual is a responsible person within the meaning of section 6672 if he has "the status, duty and authority to avoid [a] ... default in collection or payment of the taxes." Kenagy v. United States, 942 F.2d 459, 464 (8th Cir. 1991). A responsible person acts willfully if he "'acts or fails to act consciously and voluntarily and with knowledge or intent that as a result of his action or inaction trust funds belonging to the government will not be paid over but will be used for other purposes,' or by proceeding with a 'reckless disregard of a known or obvious risk that trust funds may not be remitted to the government.'" United States v. Honey, 963 F.2d 1083, 1087 (8th Cir.) (quoting United States v. Olsen, 952 F.2d 236, 240 (8th Cir. 1991)), cert. denied, 113 S.Ct. 676 (1992).

A.

Keller first contends that he is not a responsible person. He argues that Halstead and the heirs of the estate had day-to-day control over operation of the Inn and that he did not direct or control its disbursements. Keller, however, fails to recognize that more than one person may be considered responsible under

section 6672. It is not necessary that a responsible person be an actual disbursing officer. Jensen, 23 F.3d at 1394. It suffices if the person "has significant, though not exclusive, authority in the area of corporate decision-making and matters related to federal tax payments." Kenagy, 942 F.2d at 464. Moreover, an otherwise responsible person does not avoid liability under section 6672 by delegating his authority to another. E.g. Thomsen v. United States, 887 F.2d 12, 17 (1st Cir. 1989); see also Kizzier v. United States, 598 F.2d 1128, 1132 (8th Cir. 1979) (corporate officer was responsible person despite his having delegated day-to-day operations to a manager).

There is no dispute that Keller was at all times the personal representative of Wilhelm's estate, owner of the Inn. As such, Keller was personally vested under state law with the ultimate responsibility for the estate. See, N.D. Cent. Code §§ 30.1-18-01 - 30.1-18-21 (1976 & Supp. 1993). His authority over the Inn was equivalent to that of an absolute owner, holding it in trust for the benefit of creditors and other interested parties. Id. § 30.1-18-11. He controlled the estate's bank accounts, and

he was authorized to engage in various transactions on behalf of the estate. See id. § 30.1-18-15. Indeed, Keller in fact exercised that authority by, among other things, employing persons to assist in administering the estate and borrowing money for and making improvements to the Inn. Finally, Keller does not dispute that, upon learning that withholding taxes had not been paid, he filed the Inn's quarterly tax returns and made payment toward the amount of taxes due. Thus, Keller's own actions reflect that he considered himself to have certain authority and responsibility in matters relating to payment of employment taxes. Although he may have delegated to Halstead certain responsibilities relating to operation of the Inn, that delegation did not divest Keller of the ultimate authority to prevent the Inn's default in payment of the taxes. The fact that Keller chose not to fully exercise that authority is not determinative. Accordingly, we hold that Keller was a responsible person within the meaning of section 6672.

B.

Keller next claims that there is a genuine issue of material fact as to whether he willfully failed to pay withholding taxes. He argues that he had no actual knowledge that taxes were not being remitted. Even assuming Keller lacked actual knowledge, his actions or inaction, as the district court held, could still constitute willful conduct if he recklessly disregarded a known or obvious risk. Honey, 983 F.2d at 1087. Reckless conduct includes a "'failure to investigate or to correct mismanagement after having notice that withholding taxes have not been remitted to the Government.'" Hartman v. United States, 538 F.2d 1336, 1341 (8th Cir. 1976) (quoting Kalb v. United States, 505 F.2d 506, 511 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975)). "Once a 'responsible person' has had clear notice that the person to whom he has delegated responsibility for paying the taxes has wrongfully failed to pay them in the past, he continues to delegate that responsibility only at his peril." Thomsen, 887 F.2d at 19. If the responsible person continues to delegate without taking appropriate measures to

ensure that future taxes are paid, his failure to take such measures will be considered willful conduct. Id.

Here, Keller was a responsible person under section 6672 during all of the quarters that the Inn failed to pay withholding taxes. As such, once he learned of the Inn's default in making payment, he was obligated to apply unencumbered funds of the Inn to pay the taxes due for the last two quarters of 1986 and any future quarters. See Honey, 963 F.2d 1089. Keller received clear notice in 1987 that Halstead had failed to remit withholding taxes to the government, after having already learned that she had defaulted on payments in 1986 to the secretarial service that was initially hired to perform that task. Keller considered the problem serious enough that he met with Halstead and others to discuss the situation. Yet he again delegated to Halstead a second time and instructed her to pay the taxes and consult with the estate's attorney. Keller argues that his subsequent failure to pay withholding taxes was not willful because, he claims, Halstead assured him that taxes were being paid and he assumed that she was doing so. Keller,

however, was no longer entitled to rely on Halstead to make that assumption. Dougherty v. United States. 327 F.Supp. 202, 205 (D.S.D. 1971), aff'd without opinion, 471 F.2d 656 (8th Cir. 1972). Other than periodically inquiring of Halstead whether she was complying with the payroll reporting and payment requirements, Keller did nothing for more than a year to confirm that the taxes were actually being paid. Given these undisputed facts, we hold that Keller's failure to appropriately supervise Halstead or take independent action to ensure that withholding taxes were being paid was reckless and, therefore, constitutes willful conduct.

Keller also argues that his conduct was not willful because he relied on statements by the estate's attorney and that he was fearful of lawsuits by the estate's heirs. Such attempts at establishing reasonable cause to excuse the failure to pay over withholding taxes do not negate a finding of willfulness. Olsen, 952 F.2d at 241. We are not unsympathetic toward Keller's predicament. Indeed, we recognize that the "[t]he statute is harsh, but the danger against which it is directed--that

of failing to pay over money withhold from employees until it is too late, because the company has gone broke--is an acute one, against which, perhaps, only harsh measures are availing." Wright v. United States, 809 F.2d 425, 428 (7th Cir. 1987). Accordingly, we agree with the district court that there is no dispute of material fact and that the government is entitled to judgment as a matter of law.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Joseph Keller	)	
	)	
Plaintiff	)	
	)	
-vs-	)	Civil No. A1-91-066
	)	
United States of America	)	
	)	
Defendant,	)	
	)	
-vs-	)	
	)	
Lillian Halstead,	)	
	)	
Additional defendant on the counterclaim	)	

MEMORANDUM AND ORDER

Joseph Keller (Keller) initiated this civil action against the Internal Revenue Service (IRS) of the United States after he was assessed a one-hundred percent penalty under section 6672 of the Internal Revenue Code (26 U.S.C.). In this suit he seeks to recover the portion of the penalty he has paid and an abatement of the remaining unpaid balance. Keller was assessed the penalty based on an IRS determination that he is

a "responsible person" for the purposes of collecting taxes withheld from employees of the Sleepy Hollow Inn (Inn).

The IRS also assessed Lillian Halstead (Halstead) for the unpaid taxes pursuant to section 6672. The United States, on behalf of the IRS, has added Halstead as a counterclaim defendant in this action. The matter presently before the court is the United States' Fed. R. Civ. P. 56 motion for summary judgment against both Keller and Halstead. For the reasons discussed in this memorandum, the motion for summary judgment is granted.

FACTUAL BACKGROUND

In 1990, the IRS assessed Keller with a penalty in the amount of $18, 485.87 for unpaid income and social security taxes. The assessment resulted from a failure to remit taxes withheld from the wages of Inn employees for eight reporting quarters beginning with the third quarter of 1986 and ending with the second quarter of 1988. The IRS made an identical penalty assessment against Halstead.

Keller's association with the Inn arose as a result of his capacity as the personal representative of the estate of his brother, Wilhelm Keller (Wilhelm), who died in 1982. Wilhelm owned the Inn at the time of his death and had provided in his will that the personal representative of his estate, Keller, continue to operate the Inn until such a time that it became convenient to sell. Keller sold the Inn in 1982 on a contract for deed. In 1984, the buyers had difficulty making the contract payments. Although Keller renegotiated the contract terms with the buyers, they ultimately defaulted and the Inn was returned to Wilhelm's estate. Subsequently, Keller, the estate's heirs, and the estate's attorney held a meeting. Despite objection by Keller, the heirs agreed during the meeting that they would operate the Inn. Keller opposed this arrangement because he thought it best to turn the Inn back to the bank holding the mortgage. However, he ultimately acquiesced and agreed to let them operate the business. Halstead was then hired as the Inn's manager.

Halstead managed the Inn from January, 1986 until it was closed in June, 1988. She was authorized to sign checks and was custodian of the checkbook. She reconciled the bank statements, kept the books, and set salaries for employees. Also, she prepared the required tax returns and paid amounts owing for workmen's compensation insurance and state withholding taxes. As the manager, it was her responsibility to deal with suppliers and handle the day-to-day operations of the Inn.

A secretarial service had initially been hired to handle the bookkeeping and payroll. This arrangement was short-lived because the Inn defaulted in his payments for the service and a settlement had to be reached between Keller and the secretarial service for the fees. Thereafter, Halstead and one of the heirs employed at the Inn took over the books and the payroll. Keller advised Halstead to seek assistance from the estate's attorney to help her meet the payroll tax reporting and payment requirements.

Sometime around October of 1987, Keiler learned that the federal withholding taxes had not been remitted for the third and fourth quarters of 1986. He then filed the quarterly reports for those quarters and made payments toward the amounts due. Thereafter, he instructed Halstead to comply with the reporting requirements an pay the taxes in the future. Other than inquire with Halstead as to whether she was following his instructions, Keller did nothing to ensure that the taxes were being paid. Keller finally closed the Inn in June, 1988 after he learned that no more taxes had been remitted.

After the initial discovery by Keller that withholding taxes had not been remitted, and until the time it closed, the Inn continued to pay creditors and employee salaries.

DISCUSSION

Summary judgment is properly granted when review of the pleadings and other documents filed shows no existence of a genuine issue of material fact. Fed. R. Civ. Pro. 56; Celotex Corp. v. Catrett,477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court should view the

evidence, including justifiable inferences drawn from the evidence, in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Missouri, Inc., 477 U.S. 242, 255 (1986); Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337, 1339 (8th Cir. 1989). If the moving party has supported its motion for summary judgment, then the non-moving party has an affirmative burden placed on it to go beyond the pleadings and show that there is a genuine triable issue. Commercial Union Insurance Co., Inc. v. Schmidt, 967 F.2d 270, 271 (8th Cir. 1992). The mere existence of a factual dispute will not defeat a motion for summary judgment unless it is both material and genuine. Id.

Initially, it is also significant to note that the taxpayers, Keller and Halstead, bar the burden of proof on all issues. See Honey v. United States, 963 F.2d 1083, 1087 (8th Cir.), cert. denied, 113 S.Ct. 676 (1992); Ruth v. United States, 823 F.2d 1091, 1092-93 (7th Cir. 1987). Tax assessments are presumptively correct. Anderson v. United States, 561 F.2d 162, 165 (8th Cir. 1977). When the question is whether the

requirements of section 6672 have been met, " the burden is upon the party assessed to prove that it was not a responsible person or that its failure to pay the taxes was not willful." Id.

The issue presented, therefore, is whether Keller and Halstead are subject to the one-hundred percent penalty provision of section 6672 of the IRC as a matter of law. As indicated supra, they must set forth facts showing the existence of an issue that is both triable and material.

Section 7501 of the IRC provides that taxes withheld are held by the employer in trust for the United States. 26 U.S.C. § 7501. Under section 6672 of the IRC, the one-hundred percent penalty is imposed on a person required to collect, account for, and pay the tax and willfully fails to do so. 26 U.S.C. § 6672;[1] Olsen v. United States, 952 F.2d 236, 238 (8th

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[1]26 U.S.C. § 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General Rule. - Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a

Cir. 1991). Essentially, the test has two prongs. Section 6672 imposes liability when there exists both: (1) a "person required to collect, truthfully account for, and pay over any tax" (commonly referred to as a "responsible person"), and, (2) a willful act by the responsible person in failing to pay the taxes. Id. at 239.

Because the nature of section 6672 is not punitive, and is designed only to recover the amount of taxes to which the government was originally entitled, its provisions have been broadly and liberally construed. Id. The responsible person does not have to engage in every activity enumerated in section 6672. Slodov v. United States, 436 U.S. 238, 250 (1978). Additionally, there may be more than one person responsible for the penalty and there is no requirement that the person who was most responsible be held liable. Monday v. United States, 421 F.2d 1210, 1214 (7th Cir. 1970). Although two or more people can be jointly and severally liable for the penalty, the

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penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over ...

government is entitled to only one satisfaction. Hartman v. United States, 538 F.2d 1336, 1340 (8th Cir. 1976). The only condition is that the responsible person have significant control over the funds withheld. Donelan Phelps & Co., Inc. v. United States, 876 F.2d 1373, 1376 (8th Cir. 1989).[2]

1. Joseph Keller

Keller defends the motion for summary judgment by asserting that he is not a "responsible person" within the meaning of section 6672. Although he was the personal representative of the estate, Keller argues that his lack of control over daily operations, including the payment of Inn funds to creditors, excuses him from the penalty. Day-to-day

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[2]The Second Circuit has stated that:

Courts consider several factors in determining whether an individual is responsible for collecting and paying withholding taxes, including the individual's duties as outlined in the corporate bylaws, his ability to sign checks, his status as an officer or director, and whether he could hire and fire employees. The central question, however, is whether the individual has significant control over the enterprises's finances.

Hochstein v. United States, 900 F.2d 543, 547 (2nd Cir. 1990) (citations omitted) (emphasis added).

control is not necessary for a finding of liability. Schwinger v. United States, 652 F.Supp. 464, 467 (E.D.N.Y. 1987). Similarly, the delegation of responsibility does not absolve an otherwise responsible person from liability. Thomsen v. United States, 887 F.2d 12, 17 (1st Cir. 1989). Therefore, the bare assertion that Keller is not liable because he did not have control over daily operations is not persuasive. Even though various responsibilities were assumed by the heirs and Halstead, Keller remained the ultimate decision maker. However, his involvement is characterized, it remains that he was never divested of the ultimate power to veto management decisions. As the personal representative, he retained the authority to cease business activities and sell the Inn. See Kenagy v. United States, 942 F.2d 459, 465 (8th Cir. 1991) ("Responsible persons are those who have the ... authority to avoid the ... default in collection or payment of taxes.") Also, at all times relevant, he handled business negotiations for the Inn. Keller, in his capacity as personal representative, and through his actions relative to the operation of the business, was significantly

involved with the operations of the Inn. The court holds that he is a responsible person under section 6672.

Keller also maintains that he is not liable for the penalty because he did not "willfully" fail to pay over the trust fund taxes. The Eighth Circuit Court of Appeals has set out the general framework of the willful requirement as follows:

> A responsible person acts willfully within the meaning of § 6672 whenever he 'acts or fails to act consciously and voluntarily and with knowledge or intent that as a result of his action or inaction trust funds belonging to the government will not be paid over but will be used for other purposes.' A responsible person also acts willfully by proceeding with a "reckless disregard of a known or obvious risk that trust funds may not be remitted to the government."

Olsen, 952 F.2d at 240 (citations omitted) (emphasis added).

The United States assets that Keller knew in October of 1987 that trust funds taxes for 1986 were in arrears because he

filed quarterly 941 reports for the last two quarters of 1986 in October, 1987. It asserts further that Keller then continued to pay other creditors out of funds that should have been used to pay the taxes. Here, the United States argues that under Olsen, "[e]vidence that the responsible person had knowledge of payments to other creditors, including employees, after he was aware of the failure to pay over withholding taxes is proof of willfulness as a matter of law." Id. Keller maintains that after he learned of the deficiencies he took sufficient remedial action by paying the tax owing and by directing Halstead to stay current with the required tax payments. In spite of Keller's efforts, taxes withheld subsequent to this were not paid.

Keller's arguments are not convincing. The court finds there are no disputed material facts relating to the "willfulness" requirement. Other courts have held that willful conduct includes a failure by the responsible person to "investigate or to correct mismanagement after having notice that withholding taxes had not been remitted to the government." Kalb v. United States, 505 F.2d 506, 511 (2nd Cir. 1974) cert. denied,

421 U.S. 979 (1975); Internal Revenue Service. v. Blais, 612 F.Supp. 700, 710 (D.Mass. 1985). Keller's acts and omissions can be labeled as a "reckless disregard of a known risk." The reliance upon statements made by a person in control of the company's finances may be a reckless disregard of a known risk if the responsible person knew that the person making the statement was unreliable. Blais, 612 F.Supp. at 710. Reckless disregard is shown when there is a finding that the responsible person knew that the other person had failed to adequately accomplish financial tasks in the past. Id. After he gained knowledge of the Inn's tax predicament, Keller merely inquired of Halstead as to whether the taxes were actually being paid. He could have easily verified this with canceled checks or copies of quarterly reports. As it sands, Keller did not, with any degree of vigor, pursue means of proof that tax payments were actually being paid. The problem with the tax payments was treated as significant and caused Keller to meet "with the bank, and SBA counsel, the estate attorney, Halstead and the heirs."

However, the situation was never remedied and subsequent withholdings were not paid over.

The court holds that Keller, because of his knowledge of the past mismanagement of the trust funds, unreasonably relied on the statements of Halstead.

2. Lillian Halstead

Halstead maintains that she is not personally liable because she cannot be considered "responsible." Specifically, she alleges that material issues of fact are yet to be decided on the issue of her status as a responsible person because she did not have significant control over the taxes. She further indicates that it was her understanding that the estate's attorney was to pay the taxes.

The uncontroverted evidence in this case reveals that Halstead did in fact control the trust funds taxes, even though, as she alleges, that it was not her duty to remit them to the IRS. She was responsible for signing the checks, she prepared and signed paychecks, prepared the payroll ledger, and she handled all state tax matters. Moreover, she was the manager

of the business. She dealt with suppliers and creditors, maintained the books and set prices for the Inn's food and services. Her duties as the manager covered all aspects of the business and she was the custodian of the checkbook.

As noted supra, it is not necessary that Halstead engage in all the functions relating to the taxes to be a responsible person. Also, there is no requirement that the responsible person have actual payment responsibilities. See Slodov, 436 U.S. at 250; Emshwiller v. United Sates, 565 F.2d 1042, 1045 (8th Cir. 1977). Halstead collected and accounted for the taxes, and had the authority to avoid default. Accordingly, she was a responsible person for the duration of her employment.

Halstead also maintains that she did not willfully fail to collect or pay over the taxes. In the alternative, she maintains that she is not liable for taxes withheld before she had knowledge of the deficiency in January, 1988. Halstead's argument, however, does not set forth facts sufficient to show a material issue. Evidence that a responsible person paid creditors after becoming aware of a failure to pay withholding

taxes is proof of willfulness as a matter of law. Olsen, 952 F.2d at 240. Additionally, as stated in Olsen:

> A responsible person is also required to use funds acquired after the withholding tax liability arises to satisfy that liability. Thus, '[i]n the case of individuals who are responsible persons both before and after the withholding tax liability accrues ... there is a duty to sue unencumbered funds acquired after the withholding obligation becomes payable to satisfy that obligation; failure to do so when there is knowledge of the liability ... constitutes willfulness.'

952 F.2d at 240 (citations omitted). As shown by precedent, a lack of knowledge by a responsible person concerning prior default is not an issue. The issue is whether the responsible person, after learning of the default, "used unencumbered funds ... to pay creditors in preference of the IRS." Honey, 963 F.2d at 1089. The United States has alleged (Doc. #50 at 8) uncontested by Halstead, that approximately $73,000 in Inn

funds were used to pay creditors from January, 1988 until the Inn closed in June, 1988. Halstead's failure to pay the taxes, therefore, constitutes willfulness as a matter of law.

Equally unpersuasive is the argument that after Halstead had knowledge of the delinquency, she relied on Keller's statement that he would take care of the tax payment. See Kalb, 505 F.2d at 506 ("Willful conduct also includes failure to investigate or to correct mismanagement after having notice that withholding taxes have not been remitted to the Government.").

IT IS ORDERED:

1) Defendant United States' motion (Doc. #39) for summary judgment is granted. Judgment shall be entered against Joseph Keller and Lillian Halstead for the full amount of the penalty assessed, plus statutory interest from the date of the assessment, less any payments or credits.

2) Plaintiff's complaint (Doc. #1) is dismissed with prejudice. Judgment shall be entered accordingly.

Dated this 9th day of September, 1993.

/s/ Paul Benson

prejudice. Judgment shall be entered accordingly.

Dated this 9th day of September, 1993.

/s/ Paul Benson
PAUL BENSON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

NOTICE OF ENTRY
Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 9th day of September, 1993.

EDWARD J. KLECKER, CLERK

By: /s/ Sheila M. Beauchame,
Deputy

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-3793NDF

Joseph Keller. *

*

Appellant, *

*Appeal from the United States

vs. * District Court for the

* District of North Dakota

United States of America, *

*

Appellee.

The petition for rehearing filed by the appellant has been considered by the court and is denied.

March 30, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gins

Clerk, U. S. Court of Appeals, Eighth Circuit